IN THE

Supreme Court of the United States

NO. 288 OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ERIE RESISTOR CORPORATION and
INTERNATIONAL UNION OF ELECTRICAL, RADIO
AND MACHINE WORKERS, LOCAL 613, AFL-CIO

BRIEF OF ERIE RESISTOR CORPORATION OPPOSING THE PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Is every grant of additional seniority to employees replacing economic strikers *per se* unlawful?

COUNTER-STATEMENT OF THE CASE

Erie Resistor Corporation is a relatively small company having its principal office in Erie, Pennsylvania, where it also has a manufacturing plant. (R. 68a). It was engaged in the highly competitive business of manufacturing electronic components and molded plastic parts. Competition, including Japanese imports, was so severe that the Company could not interrupt deliveries

without severe and permanent loss of its markets. (R. 38a-39a, 419a-422a, 425a, 427a-429a, 449-451a).

The Company had dealt amicably with the International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, for many years, and entered into numerous written labor agreements with that Union. (R. 58a-59a, 71a-73a).

In January, 1959 at the Union's request, the Company entered into negotiations for a new contract to replace the one due to expire March 31, 1959. (R. 73a). Some twenty-one negotiating meetings were held up to March 31, 1959, and many issues were resolved, but not all of them. (R. 37a-39a, 74a-76a, 291a-296a, 233a-235a).

On March 31, 1959 the Union went on strike in support of its demands, which then included a general wage increase, limitation on subcontracting, freezing seniority for certain job incumbents, improved vacations, and assumption by the Company of certain group insurance costs. The strike was conceded to be an economic strike. (R. 3a, 37a-38a, 297a-308a, 278a-279a, 82a-84a).

On March 31, there were about 478 bargaining unit employees at work. There were about 450 bargaining unit employees on layoff. The laid off employees had seniority, but due to the depressed state of the business they had no prospect of being recalled to work. (R. 36a, 69a-70a).

The Company operated the plant throughout the strike because it had to in order to survive. (R. 38a-39a, 419a-422a, 425a, 427a-429a, 449a-451a).

All during April the Company tried to operate using salaried personnel, clerks, engineers, managers and all other non-bargaining unit personnel. Production

amounted to only 15% to 30% of that required to continue in existence. (R. 4a, 39a, 429a-430a, 409a-410a, 417a).

The biggest electronic component customer cancelled all its orders, the biggest plastics customer removed all its dies and tools, and intense pressure was put on the Company by its remaining customers to resume normal deliveries. (R. 425a, 450a-451a).

Beginning April 2 the Union engaged in mass picketing and violence in an attempt to keep everyone out of the plant. This continued throughout the strike in spite of a state court injunction and ultimately resulted in conviction of the local Union president for contempt. (R. 453a, 370a-372a, 470a, 485a).

By May 3 the Company concluded it would have to hire replacements for the strikers in order to survive. By a letter dated May 3 it notified all employees of its intent to hire permanent replacements beginning May 7. (R. 4a, 39a-40a, 431a-432a, 560a-561a, 320a).

On May 7 and 8 the Union engaged in mass picketing and violence so extensive that on one day the police closed the plant and no one could get in. These riots received prominent headlines in the only newspaper in Erie. (R. 40a, 364a-365a, 453a).

On May 11 the Company began to hire replacements. When they were hired they were told they would not be laid off or discharged at the end of the strike. This assurance was repeated when they actually came on the job. Nevertheless, many who were hired failed to report for work. (R. 4a, 40a-41a, 369a-397a, 366a,

146a-147a, 227a, 416a, 574a, 576a, 435a, 443a-444a, 343a-344a).

Beginning with the hiring of the first replacement on May 11, the Company, which had never ceased to meet in an attempt to settle the issues in dispute, placed on the bargaining table the problem posed by hiring of permanent replacements in the peculiar circumstances of this case.

On May 11, the day the first replacement was hired, the Company told the Union that in view of the layoff list of some 450 that already existed on March 31, when the strike began, some method would have to be worked out to enable the Company to keep its promise to the replacements that they would not lose their jobs after the strike ended. Since the Company was offering a contract with seniority, the Company suggested some form of seniority arrangement for replacements, but always offered to consider any solution to which the Union would agree. (R. 4a, 311a-312a, 226a-227a, 441a-443a, 435a, 146a-147a, 120a).

The Union, however, absolutely refused to bargain on the subject, taking the adamant stand that all replacements must be discharged and all strikers rehired, including five who had been discharged for violence and misconduct on the picket line. The Union maintained this position throughout the strike, up to and including the last day. (R. 311a-314a, 179a-180a, 222a-224a).

The Company did *not* announce on May 28 that its proposition to add 20 years to the seniority of replacements would go into effect. This was only one of the many proposals made to the Union in an effort to solve

the problem. (R. 41a, 343a-345a, 119a-122a, 433a, 435a, 452a-456a).

It was only after many more bargaining meetings, in which the Union adamantly refused to consider any arrangement that would allow the replacements to continue to work after the strike, that the Company, on June 10, publicly announced the reasons and need[1] for a job assurance plan, and on June 15 posted a bulletin announcing it was thenceforth in effect. (R. 6a, 42a, 556a-559a, 566a, 122a-124a, 436a, 452a).

After the Union broadcast the Company proposal of May 28, more replacements came to work, and the number steadily increased from then on, until by June 22 or 23 there were about 450 employees working in the plant, which was virtually a full complement. Of course, of these some 140 were clerks, managers, engineers and the like, and 58 were college students who were hired as temporary replacements during the summer vacation that began around June 1. (R. 522a).

On June 24 the Union sent the Company a telegram announcing that the strike was over, and after some brief misunderstanding, the strike ended on June 25, although no contract was signed at that time. (R. 7a, 43a, 567a, 569a, 166a, 214a-215a).

The 140 supervisors, clerks and engineers returned to their regular duties. The 58 college students were dismissed as promptly as strikers could be called in. All

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1. However, the Union without authorization and presumably for its own purposes had widely publicized the so-called "20-year proposal" on radio and television on May 30 and 31. (R. 6a, 41a, 173a).

the permanent replacements continued to work, and all non-replaced strikers for whom there were jobs were called in, according to seniority, with certain minor agreed-upon exceptions. (R. 7a, 409a-410a, 411a-414a).

On July 17 the Company and the Union signed a new labor contract, and simultaneously executed a "strike settlement agreement." The strike settlement agreement settled the dispute as to the five employees who had been discharged for violence on the picket lines, leaving three discharged and reinstating two with a 30-day disciplinary layoff; provided that non-replaced strikers who were not yet called back would be considered as "bidders" for open jobs; and provided that the Company's replacement and job assurance policy—the so-called "superseniority"—would be resolved by the National Labor Relations Board and the courts, and that it was to remain in effect pending final disposition of the matter. (R. 7a-8a, 44a, 166a, 168a-169a, 578a).

Thereafter, plant operations increased to a high point of 442 bargaining unit employees in September, but then due to economic circumstances declined until there were only 240 in May, 1960. (R. 7a, 523a).

Beginning in October, numbers of employees were laid off, including some returned strikers and some replacements who had been granted the so-called "superseniority." (R. 7a, 280a-282a).

The Trial Examiner found the Company had a lawful economic purpose and need for its actions, and that there was no refusal to bargain in good faith or any evidence of discriminatory motive or attitude, recommending dismissal of the complaint. (R. 33a-64a).

However, the Board on July 31, 1961, held that notwithstanding the absence of any discriminatory motive or intent or the existence of lawful purpose and need, any so-called superseniority for replacements was *per se* unlawful, and that the strike was converted from an economic strike to an unfair labor practice strike on May 29, when the Union had a meeting concerning the Company's proposal. (R. 3a-28a).

The Board refused to consider the evidence offered by the employer as to the circumstances and need for what was done, and made no findings of fact on these points.[2] (R. 19a, n. 29).

Upon appeal, the United States Court of Appeals for the Third Circuit refused enforcement on the basis of the narrow question presented by the Board's decision, saying that preferential seniority is not *per se* unlawful, but that the Board is obliged to consider the record as a whole in determining whether there was a violation of Section 8(a)(3).[3] (Appendix A to Petition for Writ of Certiorari).

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2. Under the circumstances, the only official findings before the Court are those of the Trial Examiner. His findings are part of the record and should not be ignored. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474; 95 L.Ed. 456 (1951); Cf. *N.L.R.B. v. James Thompson & Co.*, 208 F. 2d 743 (2nd Cir., 1953).

3. The alleged violation of Section 8(a)(3) was the only question before the Court. The Board had dismissed the minor, subsidiary 8(a)(5) refusal to bargain charges (R. 20a), and no independent violation of Section 8(a)(1) was alleged. (R. 81a-82a).

ARGUMENT

1. The Alleged Conflict Among the Courts of Appeal Does Not Exist.

At the time the Court of Appeals rendered its decision in this case the question of so-called "superseniority" for replacements had been before four different Courts of Appeal on five different occasions, and on each occasion the Courts held that the controlling question was whether superseniority for replacements was impelled by anti-union considerations or, on the other hand, by the employer's own legitimate economic interests.

The Ninth Circuit Court on two separate occasions rejected the *per se* theory.[4] *N.L.R.B. v. Potlatch Forests,* 189 F. 2d 82 (1951)[5]; *N.L.R.B. v. California Date Growers Ass'n.,* 259 F. 2d 587 (1958).

The Fourth Circuit Court, in *Olin Mathieson Chemical Corporation v. N.L.R.B.,* 232 F. 2d 158 (1956), said:

> "* * * With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to produce replacements save upon a promise of permanent tenure to promise such tenure to the replacements."

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4. Cf. *Pittsburgh DesMoines Steel Co. v. N.L.R.B.,* 284 F. 2d 74 (9th Cir., 1960), which involved rejection of the *per se* theory in the case of a bonus payment said to discriminate between strikers and non-strikers.

5. An excellent and unbiased discussion will be found in the article *"Potlatch Forests, Inc.,"* 100 University of Pennsylvania Law Review 287 (1951).

In that case, as the Board notes in footnote 13, page 10, of its Petition for Certiorari, the Court granted certiorari on the theory that there was a conflict with *Potlatch,* but it subsequently appeared that, as we have indicated, *Olin Mathieson* did not rest upon the *per se* doctrine, and that the two decisions were completely consistent. The decision of the Fourth Circuit Court accordingly was affirmed *per curiam* without opinion. 352 U.S. 1020.

In 1960 the Court of Appeals for the Sixth Circuit in a so-called superseniority case, *Ballas Egg Products v. N.L.R.B.,* 283 F. 2d 871, followed the rule of the prior decisions, saying:

> "* * * the petitioner's motivation in adopting, maintaining and utilizing its superseniority policy was impelled by anti-union considerations rather than by any economic interest of its own; * * *"

In December, 1960 the Seventh Circuit Court[6] in *N.L.R.B. v. Lewin-Mathes,* 285 F. 2d 329, said:

> "Having found that the strikers were not unfair labor practice strikers it would necessarily follow *that the strikers were economic strikers in which case it would be lawful and proper to grant superseniority to replacements and we so hold."* (Emphasis Supplied)

This remarkable unanimity of opinion on the part of fifteen able judges of other Courts of Appeal, now joined by three able judges of the Third Circuit Court,

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6. Cf. *N.L.R.B. v. Community Shops, Inc.,* 301 F. 2d 263 (7th Cir., 1962).

should dispel any idea that there is a conflict among the Circuit Courts.

The Board's sole reliance for this asserted conflict is the decision of the Sixth Circuit Court in *Swarco, Inc., v. N.L.R.B.*, No. 14753, decided May 23, 1962. (Set forth in Appendix D, pp. 31-40, to the Board's petition).

An examination of that decision must disclose that the asserted conflict does not exist.

Perhaps the most obvious factual difference is that in *Swarco* the employer could not argue that its need or purpose was to get or keep replacements, since it did *not* grant preferential or additional seniority to replacements, whereas that was the prime issue in the *Erie* case.[7]

In this case all the evidence and the facts as found by the Trial Examiner show that Erie's sole purpose in granting additional seniority was to keep its lawful promise to the replacements; that it had to hire replacements to survive; and that it could not get replacements without effectively assuring them permanent jobs. None of these essential facts are present in *Swarco.*

The Sixth Circuit also points out that its decision is not in conflict with *Potlatch, Olin Mathieson, California Date Growers, Lewin-Mathes,* or *Ballas Egg Products.* On the contrary, as it had implied in *Ballas Egg Products,* the Sixth Circuit, this time specifically, recognized that

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7. Erie also granted the same additional seniority to Union members who came to work, but this was necessary to avoid disparate treatment of Union and non-union employees.

"superseniority" is not *per se* unlawful. In discussing *Lewin-Mathes,* the Court says:

> "The court found that the strikers were economic strikers and that in such case it was lawful to grant superseniority to replacements. *This is in accord with the rule announced in N.L.B.R. v. Mackay Radio and Telegraph Co.*, 304 U.S. 333, at 345, 346." (Emphasis Supplied)

The implication here is that superseniority may be granted replacements regardless of need or motive, which goes far beyond the narrowly limited ruling of the Third Circuit in the instant case, but it is clearly not inconsistent with it.

In the *Swarco* case, after differentiating the facts in the case before it from those in the other cases involving superseniority, the Sixth Circuit goes on to say:

> "From a review of these cases involving "perseniority, we find that the question of violation of section 8(a)(1) and (3) of the Act, by reason of granting such superseniority, is a question of fact. *Each case must be decided on its own particular facts.*" (Emphasis Supplied)

Then, in its conclusion, the Sixth Circuit says:

> "We conclude that, *under the facts of this case,* the conduct of the petitioner in urging the strikers to come back to work on the promise of granting those who abandoned the strike and returned to work seniority over those who remained on strike constituted discrimination which did, in fact, discourage membership in the union. * * * " (Emphasis Supplied)

Again, this is entirely consistent with the conclusion of the Third Circuit in the instant case.

The Board's difficulty in the instant case, as noted by the Third Circuit, is that it refused to consider any of the facts adduced on the record, but instead relied entirely upon the *per se* theory.

Swarco represents no more than an application by the Sixth Circuit of the rules announced so many times before in the Ninth, Fourth, Seventh and its own Circuit decisions. It does not in any sense constitute adoption of the *per se* theory without regard to the facts, which is the sole point urged by the Board in the instant case.

2. No Novel or Important Question Is Raised by the Decision of the Court of Appeals.

The decision of the Third Circuit Court is carefully considered and written to dispose of the single narrow question before the Court.

It does no more than say that the Board must take into consideration the evidence on the record, and that the Board cannot, by a naked sweeping pronouncement hold that every grant of additional seniority is *per se* unlawful.[8]

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8. In this connection it may be of interest to note that superseniority for union officials, granted by Erie Resistor to this Union in this case (R. 169a, 194a, 317a-318a), is not considered extreme or unlawful. Such superseniority was sanctioned by the Supreme Court. *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U.S. 521; 93 L.Ed. 1513 (1949). And "superseniority" or preferential seniority agreed to by an employer and a

There is not the slightest conflict with the decision in *Radio Officers v. Labor Board*, 347 U.S. 17; 98 L.Ed. 455 (1954). On the contrary, as Circuit Judge Smith points out in footnote 6:

> "We recognize, as did the Supreme Court in the cited case and in other cases, the right of the Board to draw an inference of unlawful motive in the absence of evidentiary facts to support an inference to the contrary."

(Appendix A to Petition for Certiorari, page 24).

The Court of Appeals did no more than follow the instruction, found in the concurring opinion of Justices Frankfurter, Burton and Minton in *Radio Officers*, in which Mr. Justice Frankfurter said:

> "In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that *this inference may be bolstered or rebutted by other evidence* which may be adduced, and *which the Board must take into consideration.*" (Emphasis Supplied)

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union in another context has been held valid. *N.L.R.B. v. Wheland Co.*, 271 F. 2d 122 (6th Cir., 1959).

As recently as July 20, 1962 the Board in *Redwing Carriers, Inc.*, 137 N.L.R.B. No. 162, found that an employer discharged employees engaged in a protected strike, but dismissed the complaint because, as it said, the respondents " * * * did so entirely for the purpose of continuing their business operations." Thus, even the Board does not adhere to the doctrine that any foreseeable interference with protected activities is *per se* unlawful without regard to motive, need or reason.

Argument.

The Supreme Court on many occasions has rejected the *per se* or "irrebutable presumption of guilt" theory: *Teamsters Union, Local 357 v. N.L.R.B.*, 365 U.S. 667; 6 L.Ed. 2d 11 (1961); *Insurance Agents International Union v. N.L.R.B.*, 361 U.S. 477; 4 L.Ed. 2d 454 (1960).

The Board persistently and erroneously represents the ruling in the instant case as a warrant to employers to grant superseniority in every situation. No one can read the decision of the Court of Appeals and retain that impression.

The Court of Appeals simply adopted the rules established by all the other Circuits that so narrowly delimit any grant of superseniority as to render its use impossible except in unique and pressing circumstances, such as those presented in the instant case. Under the decision, the employer must still come forward with evidence, not simply protestations, of the economic need and justification for his actions, and present facts upon which the conclusion of lawful economic need and purpose can be based. Cf. *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105; 100 L.Ed. 731 (1956).

What the Board seeks is a rule that makes it unnecessary for it to consider any defenses or any evidence aside from the bare fact that additional seniority was granted.[9] That privilege was properly withheld by the Court of Appeals.

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9. Even a man accused of murder is allowed to show that he acted in self defense. Permitting no defense would be a new concept in administration of Section 8(a)(3). As Archibald Cox said in his article "The

Archibald Cox wraps up the whole idea colorfully and succinctly in "The Duty to Bargain in Good Faith," 71 Harvard Law Review, 1401, 1437, saying:

> "To say 'there ought to be a law against it' does not demonstrate the propriety of the N.L.R.B.'s imposing the prohibition."

The decision of the Court of Appeals makes no new law, presents no new problems, and poses no question not answered a dozen times over by the Supreme Court and the Courts of Appeal with remarkable uniformity.

Labor Management Relations Act," 61 Harvard Law Review 1, 20:

> "The principles to be followed in the administration of Section 8(3) has never been in dispute. * * * 'The true purpose (of the employer) is the subject of investigation with full opportunity to show the facts.' " (Quoting from *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1; 81 L.Ed. 893 (1937)).

CONCLUSION

The petition for certiorari states no reason which could justify a review by this Court of the decision of the Court of Appeals. The petition should, therefore, be dismissed.

Respectfully submitted,

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